

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE BLUEJAY PROPERTIES, LLC,
doing business as Quinton Point,

Debtor.

BAP No. KS-12-104

BANKERS' BANK OF KANSAS, NA,

Appellant,

Bankr. No. 12-22680
Chapter 11

v.

DISMISSAL ORDER

BLUEJAY PROPERTIES, LLC,
STUMBO HANSON, LLP,
UNIVERSITY NATIONAL BANK,
UNITED STATES TRUSTEE, KAW
VALLEY BANK, JOHN LARKIN,
LARKIN EXCAVATING, INC., and
TICC PROPERTY MANAGEMENT,
LLC,

January 14, 2013

Appellees.

Before THURMAN, Chief Judge, MICHAEL, and ROMERO, Bankruptcy Judges.

On December 5, 2012, this Court issued its Order to Show Cause Why Appeal Should Not Be Considered For Dismissal as Interlocutory (“OSC”). On December 19, 2012, the Appellant Bankers’ Bank of Kansas, NA filed an Amended Response to the OSC along with an Amended Motion for Leave (collectively, the “Motion for Leave”). On December 26, 2012 and January 2, 2013, respectively, the Debtor Appellee Bluejay Properties, LLC (“Debtor”) filed responses to the Motion for Leave. On January 2, 2012, Appellant filed a Reply in Support of Jurisdiction.

This appeal is of the bankruptcy court’s Order Approving Debtor’s Application for Authority to Engage Legal Counsel, entered November 20, 2012

(the “Employment Order”). The Employment Order allows the law firm of Stumbo Hanson, LLP to advise Appellee in connection with its status as a debtor in possession. Appellant filed its Notice of Appeal from the Employment Order on December 4, 2012, and on the same day filed a separate notice of appeal from the bankruptcy court’s November 28, 2012, Final Order Authorizing Use of Cash Collateral and Granting Adequate Protection (the “Cash Collateral Order”), which was assigned BAP Appeal No. KS-12-105. The finality of the Cash Collateral Order for purposes of appeal has not been questioned. *See generally In re O’Connor*, 808 F.2d 1393 (10th Cir. 1987).

This Court has jurisdiction to hear appeals from final orders, final collateral orders, and, with leave of court, interlocutory orders. 28 U.S.C. § 158; *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768 (10th Cir. BAP 1997). An order is considered final if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Orders which merely grant employment to a professional in a given case are purely interlocutory. *See In re Cook*, 233 B.R. 782, 792 (10th Cir. BAP 1998) (order approving employment or denying disqualification of professional is not a final order) (citing *Spears v. United States Trustee*, 26 F.3d 1023, 1024 (10th Cir. 1994)); *see, e.g., In re Nucor, Inc.*, 118 B.R. 786, 788 (D. Colo. 1990) (order approving counsel’s employment non-final).

A final collateral order is one that “(1) conclusively determine[s] a disputed question that [is] completely separate from the merits of the action, (2) [is] effectively unreviewable on appeal from a final judgment, and (3) [is] too important to be denied review.” *Personette*, 204 B.R. at 768. In the instant appeal, the Employment Order would be reviewable once the final fee application in the case is disposed of. It is therefore not a final collateral order.

The Employment Order is an interlocutory order, which may be appealed to

this Court with leave of court. As this Court has stated:

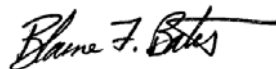
Leave to hear appeals from interlocutory orders should be granted with discrimination and reserved for cases of exceptional circumstances. Appealable interlocutory orders must involve a controlling question of law as to which there is substantial ground for difference of opinion, and the immediate resolution of the order may materially advance the ultimate termination of the litigation.

Personette, 204 B.R. at 769 (citing 28 U.S.C. § 1292(b)). Appellant argues that the Employment Order, taken together with the Cash Collateral Order, is final as it conclusively determines a discrete dispute between the parties. It appears to claim that as the Cash Collateral Order did not give it any more than “illusory adequate protection,” the use of cash collateral to pay Appellee’s legal fees as allowed by the Employment Order will result in Appellee’s attorneys fees accorded greater priority than that provided for under the Bankruptcy Code.

We conclude, however, that this argument is speculative and the better approach is to allow the bankruptcy to proceed and for Appellee to propose its plan and for its counsel to submit fee applications in due course. After the final fee application is decided, Appellant is of course free to appeal from that order (at which point the appeal of the Cash Collateral Order may be fully resolved, thereby rendering the subject matter of the instant appeal moot). At that time, the record will be more fully developed to facilitate review by an appellate court. “To hold otherwise would allow piecemeal appeals between the parties in a discrete controversy on any single cause of action – or legal issue – asserted in bankruptcy proceedings.” *Baines v. Crossingham Trust (In re Baines)*, 528 F.3d 806, 811 (10th Cir. 2008).

Accordingly, it is HEREBY ORDERED that the Motion for Leave is DENIED and that this appeal is DISMISSED.

For the Panel:

A handwritten signature in black ink, reading "Blaine F. Bates". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Blaine F. Bates
Clerk of Court